UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON, Plaintiffs, vs. SAM REED, in his official capacity as Secretary of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington, Defendants.	No. 3:09-CV-05456-BHS **NOTICE OF MOTION AND MOTION TO CONSOLIDATE AND MEMORANDUM IN SUPPORT THEREOF** NOTE ON MOTION CALENDAR: September 3, 2009 The Honorable Benjamin H. Settle **ORAL ARGUMENT REQUESTED**

TO DEFENDANTS AND THEIR ATTORNEY(S) OF RECORD:

YOU ARE HEREBY GIVEN NOTICE THAT on September 3, 2009 at 2:30 P.M., before the Honorable Judge Benjamin H. Settle, at the United States District Court for the Western District of Washington, Tacoma Division, located at 1717 Pacific Avenue, Tacoma, Washington, 98402, Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington, will and hereby do move to consolidate the hearing on Plaintiffs' Motion for Preliminary Injunction with a trial

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on the merits with respect to Count I of Plaintiffs' Complaint.[1]

This motion for consolidation is made pursuant to Fed. R. Civ. P. 65(a)(2), and on the grounds specified in this Notice of Motion and Motion to Consolidate and Memorandum in Support Thereof, and Plaintiffs' Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, the documents filed in support thereof, the Verified Complaint, and such other and further evidence as may be presented to the Court at the time of the hearing.

Pursuant to this notice, Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington do hereby move to consolidate the hearing on Plaintiffs' Motion for Preliminary Injunction with a trial on the merits with respect to Count I of Plaintiffs' Complaint.

In support thereof, Plaintiffs present the following Memorandum in Support of Motion for Consolidation.

I. Standards for Consolidation

Under Federal Rule of Civil Procedure 65(a)(2), this Court is permitted to "advance the trial on the merits and consolidate it with the hearing [for a preliminary injunction]." Before consolidating,"the parties should normally receive clear and unambiguous notice of the courts intent to consolidate the trial and the hearing either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The consolidation of a trial on the merits with the preliminary injunction hearing is appropriate when there is no dispute of material fact alleged by the parties. *Id.*

II. Consolidation is Appropriate.

Consolidation is appropriate in this case with respect to Count I of Plaintiffs' Complaint. First, Count I is a purely legal challenge to the Washington Public Records Act as it is applied to referendum petitions and a protracted discovery period is either unnecessary or unwarranted. Second, a consolidated hearing on Plaintiffs' first count preserves judicial resources and serves

[1]Because Count II of Plaintiffs' Complaint is factually based, consolidation on Count II is not appropriate at this time.

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judicial economy. Finally, precedent exists to suggest that the Court should consider Plaintiffs' challenge to the Public Records Act's application to referendum petition before their Count II request for an exemption because of a reasonable probability of threats, harassment, and reprisals.

A. There Are No Factual Issues to Be Decided.

With respect to Count I of Plaintiffs' Complaint, the Court is asked to decide the same issue at a hearing on Plaintiffs' motion for a preliminary injunction as it would be asked to decide at a trial on the merits—namely, whether the Washington Public Records Act is narrowly tailored to serve a compelling government interest.[2] The challenge is a purely legal challenge that would not benefit from a protracted discovery period designed to develop a factual record and a determination on the merits of Count I is appropriate at this stage of the litigation.

As set forth in greater detail in Plaintiffs' Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction ("Preliminary Injunction Memorandum"), to survive a First Amendment challenge, the application of Washington's Public Records Act to referendum petitions must be narrowly tailored to serve a compelling government interest. (Preliminary Injunction Memorandum at 9-11.) Whether the Public Records Act is so tailored is a legal question that does not require the resolution of factual issues.

Furthermore, the First Amendment dictates that "'Congress shall make no law . . . abridging the freedom of speech,'" *FEC v. Wisconsin Right to Life*, __ U.S. __, 127 S. Ct. 2652, 2674 (2007) (opinion of Roberts, CJ, stating holding). In other words, "no law,"—i.e., "freedom of speech" and the right to expressive association—is the constitutional *default*, and when expressive association is at issue, must be the overriding *presumption* of the law. That the Court can return the system to one in which the First Amendment controls is settled law: "[W]e have stressed in First Amendment cases that the deference afforded to legislative findings does not foreclose our independent judgment of the facts bearing on an issue of constitutional law. . . . This obligation to exercise independent judgment when First Amendment rights are implicated is

[2] The Facts of this case are set forth in Plaintiffs' Verified Complaint and Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, and will not be repeated here.

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not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys. v. FEC*, 512 U.S. 622, 666 (1994) (citations omitted).

Because of the potential chilling effect of a law that burdens First Amendment rights, a "shoot first, ask questions later" approach is itself an enemy of the First Amendment. If the Washington legislature failed to draw a "reasonable inference based upon substantial evidence," the Court must find the Public Records Act unconstitutional as applied to referendum petitions. Washington is aided, in part, by prior court decisions which have delineated the potential state interests. (Preliminary Injunction Brief at 15-18.) The State cannot be permitted to conduct a fishing expedition to determine whether it can find, or perhaps create, some evidence of a compelling state interest. Thus, it is appropriate to consolidate the hearing on Plaintiffs' Motion for Preliminary Injunction with a trial on the merits.

B. A Decision on Count I Preserves Judicial Resources.

In addition to there being no factual issues for the Court to decide as to Count I of Plaintiffs' Complaint, a decision in favor of Plaintiffs on the merits of Count I would end the case without the need for expensive and time consuming discovery with respect to Plaintiffs' second count, thus preserving judicial resources. Furthermore, a decision against Plaintiffs would also serve judicial economy because it would focus the parties on the narrow issue of whether there is a reasonable probability of threats, harassment, and reprisals if the Referendum 71 petition is made public. Therefore, it is appropriate to consolidate the hearing with respect to Count I.

C. Making an Initial Determination on the Constitutional Issue in the Context of Campaign Disclosure is Precedented.

Finally, this Court should decide Plaintiffs' first count before proceeding to answer Count II, i.e., the issue of whether Referendum 71 is exempt from the Public Records Act because there is a reasonable probability of threats, harassment, and reprisals. The "reasonable-probability" test was created in *Buckley*, 424 U.S. at 73, only after the Court had determined that the disclosure provision at issue was narrowly tailored to serve a compelling government interest. The order is

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consistent with the "no law" default discussed above. Furtheremore, the reasonable-probability test is an extraordinary remedy, one that is necessary only after the state has demonstrated that its law is narrowly tailored to serve a compelling government interest. Thus, the presence of Plaintiffs' second count, which may necessitate the development of a factual record, should not preclude the Court from consolidating the preliminary injunction hearing with the trial on the merits with respect to Count I.

III. Conclusion

For the reasons set forth above, Plaintiffs respectfully request that the Court grant their Motion to Consolidate the Motion for Preliminary Injunction with a trial on the merits, with respect to Count I of Plaintiffs' Verified Complaint.

Dated this 10th day of August, 2009.

Respectfully submitted,

/s/ Sarah E. Troupis

James Bopp, Jr. (Ind. Bar No. 2838-84)*
Sarah E. Troupis (Wis. Bar No. 1061515)*
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**Pro Hac Vice Application Granted*

CERTIFICATE OF SERVICE

I, Sarah E. Troupis, am over the age of 18 years and not a party to the above-captioned action. My business address is 1 South Sixth Street; Terre Haute, Indiana 47807-3510.

On August 10, 2009, I electronically filed the foregoing document described as Plaintiffs' Notice of Motion and Motion to Consolidate, and Memorandum in Support Thereof, with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

James K. Pharris
jamesp@atg.wa.gov
Counsel for Defendants Sam Reed and Brenda Galarza

I declare under the penalty of perjury under the laws of the State of Indiana that the above is true and correct. Executed this 10th day of August, 2009.

/s/ Sarah E. Troupis
Sarah E. Troupis
Counsel for All Plaintiffs

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